Patrick Burkett (P33397)
David F. Greco (P53523)
Attorneys for Zelanko Defnedants
2000 Town Center
Suite 900
Southfield, MI 48075
(248) 355-0300

Jon D. Vander Ploeg (P24727)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant-Appellants
250 Monroe Avenue
200 Calder Plaza Building
Grand Rapids, MI 49503-2251
(616) 774-8000

SUPPLEMENTAL BRIEF

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INTRODUCTION

Defendants submit this brief as a supplement to the Application for Leave to Appeal previously submitted on their behalf. This Court's Order of June 11 permitted the filing of supplemental briefs within 28 days after that date.

There is little more to say of additional substance, beyond what defendants have provided in their Application for Leave to Appeal. This brief, however, offers that the Court might resolve this appeal by a peremptory order or opinion reversing the Court of Appeals, without the need for granting leave. Further, this brief will discuss several decisions of the Court for Appeals that have followed this Court's decisions in the *Chandler* and *Stanton* cases.

QUESTION PRESENTED FOR REVIEW

I. **WHETHER THE BROOM TRACTOR, EQUIPPED AND USED SOLELY FOR THE PURPOSE OF SWEEPING THE ROADWAY, INCAPABLE OF NORMAL HIGHWAY TRAVEL, AND NOT FOR THE PURPOSE OF TRANSPORTING PASSENGERS OR THINGS OVER ROADS OR HIGHWAYS, IS A "MOTOR VEHICLE" WITHIN THE MEANING OF *STANTON*?**

Plaintiff says, "yes."

Judges Murphy and Griffin say, "yes."

Judge Wilder says, "no."

Defendant says, "no."

II. **WHETHER PLAINTIFF'S COMPLAINTS ABOUT THE BROOM TRACTOR BEING USED TO SWEEP ON A DRY, WINDY DAY, WITHOUT DEFENDANT HAVING WETTED THE ROADWAY TO PREVENT WINDBORNE DUST AND SAND OBSCURING HER VISIBILITY, IMPLICATES NEGLIGENT "OPERATION OF A MOTOR VEHICLE" WITHIN THE MEANING OF *CHANDLER?***

Plaintiff says, "yes."

Judges Murphy and Griffin say, "yes."

Judge Wilder says, "no."

Defendant says, "no."

III. **WHETHER THE TRACTOR/MOWER EQUIPPED AND USED SOLELY FOR THE PURPOSE OF MOWING GRASS ADJACENT TO HIGHWAYS, INCAPABLE OF ORDINARY HIGHWAY TRAVEL AND NOT USED FOR THE PURPOSE OF TRANSPORTING PASSENGERS OR THINGS OVER ROADS OR HIGHWAYS, IS A "MOTOR VEHICLE" WITHIN THE MEANING OF *STANTON*?**

Plaintiff says, "yes."

Judges Murphy and Griffin say, "yes."

Judge Wilder says, "no."

Defendant says, "no."

IV. WHETHER PLAINTIFF'S COMPLAINT THAT THE OPERATOR OF THE TRACTOR/MOWER FAILED TO OBSERVE AND REMOVE DEBRIS FROM THE AREA BEING MOWED, IMPLICATES "NEGLIGENT OPERATION OF A MOTOR VEHICLE" WITHIN THE MEANING OF *CHANDLER*?

Plaintiff says, "yes."

Judges Murphy and Griffin say, "yes."

Judge Wilder says, "no."

Defendant says, "no."

STATEMENT OF FACTS

Defendant's Application for Leave contains a relatively detailed Statement of Facts with record references. What follows here might assist the Court by distilling those facts to the few most necessary for deciding this appeal. Defendants adopt by reference, however, the more detailed Statement of Facts set forth in their Application.

In the *Regan* case, plaintiff collided with the Road Commission's broom tractor. The Road Commission was performing shoulder maintenance with a procession of vehicles. The first vehicle was a grader and it was followed by a heavy truck with a blade. Third, was the broom tractor which swept sand, dirt, and gravel from the roadway surface. Last in the procession was a pickup truck carrying a lighted arrow board to direct traffic around the procession. The Road Commission also employed another pickup truck to move stationery signs which read "Road Work Ahead."

Ms. Regan was attempting to pass the procession when her vehicle was enveloped in a dust cloud. Lack of visibility, she says, caused her to collide with the broom tractor. Although her complaint makes general allegations about failure to use due care and caution in the operation and control of the tractor, the true gravamen of her complaint is more specific. She complains that the Road Commission should not have operated the broom tractor on a "blustery, windy day," and that the Road Commission failed to provide a water truck to settle the dust and debris before sweeping the roadway.

The only other facts necessary for the *Regan* case concern the nature of the broom tractor. It is depicted for the Court by photograph. It is a tractor which will carry a single person, the operator. It is obviously incapable of ordinary highway travel. It is equipped with the large power-driven rotating broom. Its use, as so equipped, is solely for the purpose of sweeping the roadway.

In the *Zelanko* case, the plaintiff is a truck driver who was proceeding along the highway when his windshield was struck by a piece of tire debris thrown by the Road Commission's tractor/mower. This tractor is also depicted for the Court in photographs. It accommodates a single person, the operator. It is

obviously incapable of normal highway operation. Equipped as a mower, it has no other use than to cut grass adjacent to highways maintained by the Road Commission.

Mr. Zelanko makes general allegations of failure to operate the mower in a careful and prudent manner, but the gravamen of his complaint claims that the mower operator, Mr. Sheehan, failed to exercise reasonable and ordinary care to keep a sharp lookout to avoid debris in the grass. He claims Mr. Sheehan was negligent for failing to avoid driving over this or other debris, when he knew, or should have known, what might happen if he did so.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DECISION OF THE COURT OF APPEALS BY PEREMPTORY ORDER.

A. Neither the broom tractor nor the tractor mower are "motor vehicles" within the meaning of *Stanton*

In *Stanton v City of Battle Creek*, 466 Mich 611; 647 NW2d 508 (2002), this Court determined the Legislature's meaning when it used the term "motor vehicle" in the statute's exception to governmental immunity. The Court looked to dictionary definitions and settled on the following:

> The definition of a "motor vehicle" as "an automobile, truck, bus or similar motor driven conveyance" is the narrower of the two common dictionary definitions. Therefore, we apply it to the present case. A forklift – which is a piece of industrial construction *equipment* – is not similar to an automobile, truck, or bus. Thus, the motor vehicle exception should not be construed to remove the broad veil of governmental immunity for the negligent operation of a forklift.

The Court's decision in *Stanton* was driven by two principles. First, the grant of immunity is broad, and its exceptions should be narrowly construed. Second, where the Legislature has used a term without giving it particular definition, it has its plain and ordinary meaning. Dictionaries provide guidance in that regard, and the Court looked to them for the definition of "motor vehicle," leading to the conclusion cited above.

The Court should peremptorily reverse the Court of Appeals, because neither of these tractors are "motor vehicles" within the meaning of the statute. The majority of the Court of Appeals reached a conclusion that is easily demonstrated to be fully at odds with the *Stanton* decision. The majority said that the forklift in *Stanton* was a piece of industrial equipment, and that these tractors are akin, rather, to automobiles, trucks, and busses. Nothing could be farther from their plain and obvious nature and uses.

These tractors are not at all like automobiles, trucks, busses, or similar motor driven conveyances. Automobiles, trucks, and busses are all similar in that they are all conveyances. All are intended for use upon roads and highways for the purpose of conveying people and things.

The tractors in these cases have no similar use or purpose. Rather, they are, like the forklift, pieces of equipment with very specific intended functions. One is for sweeping, and the other is for mowing grass. Neither is intended, nor suitably used, for conveying passengers or things along the roads or highways in the manner of busses, trucks, or automobiles. Very simply stated, neither of these tractors is a "motor vehicle" as defined by *Stanton*.

The majority's decision in the Court of Appeals in this case is wrong, and there is little to debate in that regard. Hence, this Court could best serve the parties in this case, and others looking to the meaning of the *Stanton* decision, to reverse the Court of Appeals by peremptory order.

B. Neither plaintiff complains about the tractor in question being "operated as a motor vehicle" within the meaning of *Chandler*, or within this Court's earlier decision in *Robinson*

The majority decision of the Court of Appeals held not only that both of these tractors are "motor vehicles", but also that the plaintiffs' complaints in both cases involved operation of them as motor vehicles. Again, that decision is so demonstrably wrong, without the need for further debate, that this Court should reverse the decision by peremptory order.

In *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), this Court interpreted the language, "operation of a motor vehicle." The Court was again guided by the principle that exceptions to governmental immunity must be given narrow construction. With that in mind, the Court concluded that "operation of a motor vehicle" means the motor vehicle being operated *as* a motor vehicle. Expanding upon that, the Court said, 'operation of a motor vehicle' encompasses activities that are directly associated with the driving of a motor vehicle." *Chandler, supra*, 319 – 321.

From the *Stanton* decision, we know that for a motor vehicle to be operated as a motor vehicle, it must be operated in a manner similar to an automobile, truck, bus, or similar motor driven conveyance. Hence, even if the plaintiff were complaining about some negligent use of a motor vehicle, but not "as a motor vehicle," the complaint would not come within the motor vehicle exception.

Without question, neither the broom tractor nor the tractor mower was being operated in the manner of a motor driven conveyance like a car, truck, or bus. In the *Regan* case, the plaintiff complains, not that the broom tractor was being negligently driven in some manner, but rather that it was being used on a dry, windy day and without the Road Commission having sprayed water on the dust and debris to keep it from becoming airborne. Hence, the Regan plaintiff is not complaining about negligent "operation of a motor vehicle." She is complaining about an alleged negligent choice to sweep the roadway on a dry, windy day without the application of water to it.

Similarly, in the *Zelanko* case, the plaintiff is claiming negligent grass mowing, not negligent "operation of a motor vehicle." Moreover, the true gravamen of the plaintiff's complaint is that the mower operator failed to observe and remove debris before proceeding with the mower. Plaintiff is not complaining about negligent driving in the sense of one driving a truck, bus or automobile. He is complaining about an alleged negligent decision to mow without watching for debris or removing it from the path of the mower.

Both of these cases should also be guided by this Court's decision in *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). In *Robinson*, the Court addressed the motor vehicle exception in the context of injury suffered during a police chase. Among its holdings, the Court said that the officer's decision to pursue a fleeing vehicle did not constitute negligent operation of a vehicle. The Court reasoned that the decision to pursue a fleeing motorist, "which is separate from the operation of the vehicle itself, is not encompassed within the narrow construction of the phrase 'operation of a motor vehicle.'" *Robinson, supra*, 457.

In both of the cases now before the Court, the plaintiffs are complaining about decisions and actions taken by machine operators not directly associated with the driving of a vehicle. *Regan* complains about a decision to sweep the roadway on a dry and windy day, without first wetting the debris. In *Zelanko*, the plaintiff faults the driver of the mower for his decision to mow grass without a careful

lookout and without first removing debris from the mower's path. Plaintiff has, obviously, no particular complaint about the manner in which the mower operator drove the tractor. Hence, the court's analysis in *Robinson* leads to conclusion that these plaintiffs do not have claims within the motor vehicle exception. For this reason, as well as those discussed earlier in this brief, the Court must reverse the decision of the Court of Appeals and ought to do so by peremptory order.

II. IF THE COURT CHOOSES NOT TO REVERSE BY PEREMPTORY ORDER, IT SHOULD GRANT LEAVE TO APPEAL

The Court may well correct matters by peremptory order. Should it have some question needing further answer before deciding the case, it should grant leave to appeal. Clearly these issues are of great importance to the jurisprudence of the State of Michigan effecting, as they do, governmental liability claims that arise on a regular basis. *Chandler* and *Stanton* provided the guidance needed for proper application of the motor vehicle exception to governmental immunity. Now the published decision in the Court of Appeals in this case has again muddied the waters. Moreover, the majority's decision in this case has wrongfully circumscribed and minimized the precedential meaning of the *Stanton* and *Chandler* decisions.

The regularity with which the motor vehicle exception is at issue is shown by the several decisions of the Court of Appeals since *Chandler* and *Stanton*. In *Wilson v Lake County Road Commission*, unpublished opinion per curium of the Court of Appeals, decided November 19, 2002 (Docket No. 233672), Judges Griffin, Gage, and Meter, decided that the plaintiff's claim for injuries from snow thrown by a passing snowplow comes within the motor vehicle exception. Though this case was decided after *Chandler*, *supra*, the panel decided to give *Chandler* no consideration at all. It chose instead, to take the undersigned counsel to task in footnote 1. The personal aside in footnote 1 was wholly unwarranted, as counsel explained in a Motion for Reconsideration, a copy of which is attached hereto as Exhibit A. The panel responded with an Order simply denying the motion. Most importantly for this case, Judge Griffin

demonstrated his unwillingness to follow *Chandler* then, just as he has done again when he joined with Judge Murphy in this case.

In March 2003, another panel of the Court of Appeals decided *Poppen v Tovey*, 256 Mich App 351; 664 NW2d 269 (2003), and there followed the authority of the *Chandler* decision. In that case, the driver of a city water truck stopped and left the truck in the roadway for several minutes while he checked a nearby fire hydrant. The plaintiff collided with the truck, was injured, and claimed against the city for negligent operation of a motor vehicle. The Court of Appeals, looking to *Chandler*, concluded that the plaintiff was not complaining about the "operation" of a motor vehicle.

In *Puroll v Gaylord Community School District*, unpublished per curium decision of the Court of Appeals, decided July 24, 2003 (Docket No. 234445), another panel of the Court of Appeals decided that the plaintiff, a child injured while crossing the street to board a school bus, did not have a claim involving negligent operation of a motor vehicle. The Court looked to both *Robinson*, supra and *Chandler, supra*, to conclude that the motor vehicle exception was not implicated by the plaintiff's complaints.

At the end of 2003, another panel of the Court of Appeals rather easily decided that plaintiff's claim did not come within the motor vehicle exception. In *Fraser v Lake Erie Transportation Commission*, unpublished per curium of the Court of Appeals, decided December 11, 2003 (Docket No. 242330), plaintiff complained that she had been sexually assaulted by a bus driver employed by the Transportation Commission. The Court looked to *Chandler* and concluded that plaintiff's complaint was not about the ordinary driving of the motor vehicle. Thus, the exception, again, was not implicated.

Finally, in *English v County of Washtenaw*, unpublished per curium decision of the Court of Appeals, decided March 9, 2004 (Docket No. 243693), another panel reviewed the claim of a pedestrian who was struck by a sheriff's department vehicle. The injured plaintiff was intoxicated, under the influence of alcohol and cocaine, and wandering about a darkened road. Sheriff's deputies, while investigating an armed robbery at a convenience store, were told by a motorist that he had narrowly

avoided the plaintiff, who was wandering about the roadway in the dark. Later, when the deputies left the robbery investigation, they were driving along the same road in their patrol car, and they did not see and they struck the plaintiff in the roadway.

The Court again looked to *Chandler*, and to the Court of Appeals decision in this case, and concluded that the alleged injuries must be directly caused by the "manner of operation" of the vehicle to come within the exception. The Court held that plaintiff had no evidence to show the deputy was negligently operating his patrol car at the time. The Court held, on that basis, that the circuit court had erred by failing to dismiss the plaintiff's claims.

The foregoing decisions are attached to this brief, together, as Exhibit B. Perhaps they demonstrate, to some extent, that the Court of Appeals needs more direction regarding the meaning of *Chandler, supra*. In that event, the Court should grant leave to appeal in order to fine tune its holding in *Chandler* by means of another opinion in this case.

On the other hand, only Judges Griffin and Murphy, in their majority opinion in this case, have given *Chandler* a strained and narrowed reading. Consequently, as argued above, the Court may well end any confusion regarding the meaning of *Chandler* by a peremptory order of reversal in this case.

RELIEF REQUESTED

For all of the foregoing reasons and authorities, defendants respectfully request that the Court, by peremptory opinion and order, reverse the decision of the Court of Appeals for the reason that these plaintiff's claims do not come within the motor vehicle exception to governmental immunity, or in the alternative, that the Court grant leave to appeal for further consideration and full opinion and decision.

DATED: July 9, 2004

SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant-Appellants
250 Monroe Avenue
200 Calder Plaza Building
Grand Rapids, MI 49503-2251
(616) 774-8000